

To: The Hardwood Advisory Committee Oak Woodlands Ordinance Ad Hoc Committee
From: Muriel Zeller, 2640 Stagecoach Drive, Valley Springs, CA 95252
Regarding: Calaveras County Chapter 17.0101 Draft Oak Woodland Mitigation Ordinance
Date: 9/25/23

Via Email

Dear Committee Members,

I was sorry to learn that the July meeting of the Hardwood Advisory Committee (HAC) was cancelled due to lack of a quorum. Apparently, you are still working on the same draft oak ordinance for which I provided comments via email on 8/28/23. Today, I will revisit some of those comments and include some new ones. I will confine my comments on behalf of the Calaveras Planning Coalition to this single document rather than both attaching comments and putting comments in the body of the email. I think that will make my remarks easier to understand. I appreciate the responses I received from two members of the ad hoc committee.

Purpose of the Ordinance

The following is excerpted from the ordinance with modified strikeouts and additions (in red).

Purpose

The purposes of the Oak Woodlands Mitigation Ordinance are as follows:

- (1) Mitigate any significant direct and cumulative impacts to oak woodlands in conjunction with discretionary project development;
- (2) Address pre-development removal of oaks in conjunction with discretionary projects;
- (3) Retain Heritage Trees ~~to the greatest extent feasible~~ because of their scenic, historic, cultural, ecological, and habitat values;
- (4) Leave oak woodlands connected, ~~when possible~~, to retain wildlife corridors and avoid habitat fragmentation;
- (5) Work with the federal and state governments to create a county-wide Habitat Conservation Plan and Natural Communities Conservation Plan that includes oak woodlands' special status species habitat;
- (6) Encourage voluntary conservation of oak woodlands on private property, and protect oak woodland working landscapes that provide a variety of ecosystem goods and services not only to their owners but to society in general;
- (7) Link mitigation for the conversion of oak woodlands to the county's open space plan and the county's identified and mapped priority lands for conservation;
- (8) Prevent any further loss of oak woodlands in Calaveras County (no net loss);
- (9) Comply with the requirements of the California Oak Woodlands Conservation Act.

Previously, I suggested that the purpose of the ordinance be expanded and that the equivocation inherent in terms like "to the extent feasible" and "when possible" are removed. Since the California Environmental Quality Act (CEQA) only requires mitigation of significant impacts, I withdraw my previous objection to "significant" in purpose 1. As to the extraneous language I struck under purposes 3 and 4, it concerns what is feasible or possible, which are obviously decisions for qualified professionals to make based upon education, training, experience, and common sense. Equivocal language makes it sound as if the purposes of the ordinance are vulnerable to a developer that has enough juice with the board of supervisors to get an exemption from the purposes.

Purpose 2 is to address pre-development removal of oaks, but there doesn't seem to be any mention in the draft ordinance of how that will be done. Tuolumne County adopted an entire ordinance that only addresses pre-development removal of oaks. Tuolumne's website explains, "On April 1, 2008, the Board of Supervisors adopted Ordinance 2903 which added chapter 9.24 to the Tuolumne County Ordinance Code. Chapter 9.24 is intended to discourage the premature removal of oak trees by establishing procedures and penalties for such removal.

"Premature removal means:

- Removal of native oak trees resulting in a 10% or greater average decrease in native oak canopy cover within an oak woodland
- Removal of any old growth oak tree
- Removal of any valley oak tree measuring five inches or greater in diameter at breast height (DBH) from a site within the five years preceding the submission of an application for a discretionary entitlement from Tuolumne County for a land development project

"The premature removal of native oak trees is subject to penalties, including withholding approval of an application for a discretionary entitlement on the site for a period of up to five years, and monetary penalties as high as three times the in-lieu fee established by the Board of Supervisors (emphasis mine)." I really think it should be at least ten years. In addition, it should be made clear that the owner of any agricultural land that is exempt from the oak ordinance is not exempt from the penalties for pre-development removal under the guise of agricultural activity.

I have added five more purposes. Number 5 should be a stated purpose of the ordinance, because a Natural Communities Conservation Plan (NCCP) would provide an exemption from the Oak Woodlands Conservation Act under the following circumstances: "Projects undertaken pursuant to an approved Natural Community Conservation Plan or approved subarea plan within an approved Natural Community Conservation Plan that includes oaks as a covered species or that conserves oak habitat through natural community conservation preserve designation and implementation and mitigation measures that are consistent with this section."

A Habitat Conservation Plan (HCP) and an NCCP are often done in conjunction with one another. The plans can be countywide or project specific. A countywide HCP/NCCP would streamline California Environmental Quality Act (CEQA) review for discretionary development projects while protecting vulnerable species habitat. It is an opportunity to benefit the economy and the natural environment of Calaveras County and has the added benefit of fulfilling another important implementation measure of the current General Plan, COS-4C: Habitat Conservation Plan for Amphibians. This is, of course, an expensive endeavor, but there is grant funding available such as a Natural Community Conservation Planning Local Assistance and 30x30 Grant from Fish & Wildlife. I have previously provided information about this grant to the planning director. (Please see the California Grants Portal (<https://www.grants.ca.gov/> for additional funding opportunities.)

Number 6 addresses voluntary management of oak woodlands, which I am glad to see you mentioned in the Introduction, "In 1996 Calaveras County adopted a resolution (96-284) for the creation of an Oak Woodland Voluntary Management Guidelines. This document remains relevant and its use is still encouraged." It just seems like voluntary oak conservation and management should appear to be less of an afterthought at the end of the Introduction, especially

since, for example, grazing land, rangelands, and oak woodlands have proven to be better carbon sinks than forests.

Number 7 may be more of a challenge to implement, because in order to link oak woodland mitigation to the county's open space plan, the county General Plan needs to have a completed open space plan. For example, it does not include identified and mapped priority lands for conservation as the state requires. The General Plan's Conservation and Open Space Element doesn't even include a map.

I'm also wondering how protected mitigation lands will be zoned under the zoning code update. Will they be included in the Environmental Protection Overlay Zone as would seem appropriate? According to the draft Zoning Code Update Zone District Use and Regulations (page 50), "The purpose of the Environmental Protection (EP) Overlay Zone is to designate environmentally sensitive areas for protection of the public health, safety, and welfare. The EP Overlay Zone is intended for areas subject to potential flooding, sensitive archaeological areas, or sensitive environmental habitats."

Land set aside to mitigate for the conversion of oaks and oak woodlands definitely would qualify as sensitive environmental habitat that is being protected for the public welfare. In addition, any land in the EP Overlay Zone will require "**Maximum feasible mitigation measures to protect the resource and a program for monitoring and evaluating the effectiveness of the mitigation measures.** (emphasis mine)."

The draft Regulations even say, "All use, development, and disturbance of land within the EP Overlay Zone shall be consistent with a mitigation or **resource protection plan prepared for the area.** If no plan exists, **a plan shall be prepared by the applicant** based on a site-specific assessment prepared by a qualified professional (emphasis mine)." This is beginning to sound like a very pricey proposition for the developer.

My addition of purposes 8 and 9 just seem like obvious statements to emphasize that the ordinance is going to be taken seriously. I would hate to think that the creation of an oak ordinance is simply a check-the-box exercise.

Mitigation Measures

It will be difficult to advance an ordinance through the Planning Commission (PC) and get it approved by the Board of Supervisors (BOS) if the only mitigation option is a conservation easement, which currently seems to be the case. Contributing to the state's Oak Woodlands Conservation Fund is a non-starter because the money would not benefit Calaveras County. The idea, as stated, is local mitigation for local conversion. I am afraid that some PC or BOS members will see the state's conservation fund as an attractive mitigation measure, because it is easy and cheap.

The April minutes indicate that in lieu fees will be removed from the draft ordinance due to the expense of a nexus study. (I have attached a definition of in lieu fees from the California Council of Land Trusts that I have always found helpful.) El Dorado County based their cost assumptions on the average parcel size of priority lands in their county:

"The 2008 analysis developed a per-acre cost for three broad oak woodland conservation activities: acquisition, management, and monitoring. The study estimated cost assumptions for each activity based on a variety of sources, and then applied these assumptions to a hypothetical conservation easement of approximately 125 acres in size. **This parcel size was selected because it reflected the average parcel size within Priority Conservation Areas** (emphasis mine)." As stated previously, Calaveras County has not identified priority lands for conservation, so the El Dorado model wouldn't work here at present.

A nexus study can be done for in lieu fees on a project-by-project basis. However, that would pose some problems. The first problem is the cost of the nexus study. The in-lieu fee for the loss of an oak tree is usually small, perhaps \$150 per tree. A serious nexus study may cost \$30,000. Thus, unless the project is going to cut down more than 200 trees, the nexus study will cost more than the mitigation fee.

The second problem with project by project in-lieu fee studies is that the fees charged may end up being vastly different. One study may charge \$25 per tree, while another charges \$250 per tree, while another one charges \$1000 per acre of woodland lost. Somebody upset by this may argue that the fee is unreasonably low under the state's Mitigation Fee Act, is not supported by substantial evidence under CEQA, or is arbitrary. On the other hand, somebody who thinks the fee is unreasonably high may challenge it as an unconstitutional taking.

A third problem is that the in-lieu fee may be premised on vastly different levels of impact mitigation. One fee may cover the cost of planting acorns, one may cover the cost of planting 15-gallon trees, and one may cover the cost of getting a conservation easement on an acre of land, while still another includes the cost of tree management and mitigation monitoring. A person upset that the mitigation measures are insufficient may challenge them under CEQA. A project proponent who thinks the mitigation measures are excessive may challenge them as unconstitutional.

The fourth problem is the nexus study should be paid for by the project proponent, but it should be county officials that hire and oversee the work of the consultant, not the developer, who may not be enthusiastic about such an arrangement.

The sixth problem common to all such in lieu fee programs is that oak trees do not live in bank accounts. An in lieu fee only works if it is spent in time to actually mitigate the impacts of oak tree loss on the ground. The people administering the fund need to be dedicated to oak woodland conservation. An in lieu fee fund administered by supervisors who are already overburdened will not work.

One way to address in lieu fees is for the County to complete a simplified nexus study that does not cost a lot but adopts a reasonable in lieu fee. A good place to start is with a survey of oak mitigation fees in California to ensure that the Calaveras fee ends up being in the thick middle of the distribution. Such a fee is unlikely to be successfully challenged. The County should also update the nexus fee annually based upon an appropriate cost of living index. Every five years the County would likely need to update its mitigation plan and the associated mitigation fee for its fees to remain enforceable. As to who receives and administers the fees, I would recommend the Resource Conservation District, the Mother Lode Land Trust, or the Agriculture Commissioner.

Another potential mitigation measure is the stacking of conservation easements, which refers to the practice of layering more than one conservation easement on a single property to protect multiple resources. I am ordinarily opposed to stacking, but in this instance I would support it if it was limited to stacking an oak woodland conservation easement on top of an agricultural conservation easement. This would essentially remove the agricultural exemption from the oak ordinance and would, for example, prevent cutting oaks for the commercial sale of firewood or arbitrarily removing oaks to build a new barn. Best management practices such as rotational grazing could also be part of the easement conditions.

Another mitigation option is a fund established by the county for the restoration of oak woodlands. The county could impose its own conditions on the fund. I would favor such a fund if it was used to restore oak woodlands that had been damaged, for example, by over-grazing,

wildfire, or harvesting trees as firewood. The money could be used to promote best management practices such as rotational grazing by paying for cross-fencing and the use of soil amendments. Restoration would also provide other ecosystem benefits such as increased carbon sequestration and improved water quality and wildlife habitat. There would, of course, have to be an agency or county government department that would be willing to administer the fund and monitor the funded projects. There would have to be an application process and acceptance of funding should also require a minimum 50-year deed restriction. This would be less onerous to those opposed to perpetual conservation easements.

I thank the members and staff of the Calaveras Planning Coalition who contributed to these comments. I thank the members of the HAC Ad Hoc Committee who are working to craft an effective Oak Woodland Mitigation Ordinance.

Regards,

Muriel Zeller

Community Action Project Governing Committee/Calaveras Planning Coalition Member

Attachment:

California Council of Land Trusts: In Lieu Fees

cc:

Tom Infusino, Calaveras Planning Coalition Facilitator

Megan Fiske, CAP/CPC Outreach Coordinator

Joyce Techel and Colleen Platt, MyValleySprings.com

Ben Stopper, District 5 Supervisor and Hardwood Advisory Committee Chair

Jesse Fowler, Agriculture Commissioner

Julie Moss-Lewis, Deputy County Council